



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Reliable Trash Service Co. of MD., Inc.
File: B-234367
Date: June 8, 1989

DIGEST

1. Protest presents a significant issue justifying consideration on the merits even if it is untimely filed where, based on the fully developed record, it is clear that the issues raised involve improper agency action inconsistent with statute and regulation.
2. Protest is sustained where solicitation for refuse collection and disposal allows either on-post disposal or off-post disposal, but provides for evaluation of cost of additional work for on-post bids, even though work is unrelated to collection and disposal requirement and will have to be performed even if a contract is awarded for off-post disposal; under this evaluation scheme bidders were not competing on equal basis and award did not result in lowest ultimate cost to the government.

DECISION

Reliable Trash Service Co. of MD., Inc., protests the award of a contract to Mark Dunning Industries, Inc. (MDI), under invitation for bids (IFB) No. DAKF24-89-B-0031, issued by the Department of the Army for refuse collection and disposal at Fort Polk, Louisiana. Reliable contends that the Army did not evaluate bids properly. We sustain the protest.

The solicitation contained two alternative schedules on which bids could be submitted: Schedule I, requiring on-post refuse disposal, and Schedule II, requiring off-post disposal. Schedule I provided for a base period (CLIN 0001) of 1 year plus two 1-year option periods (CLINs 0002 and 0003). Four sub-items were listed under the base period: 0001AA, for collection of all solid waste at Fort Polk and its transport to Fort Polk's landfill; 0001AB, for operation of Fort Polk's landfill and disposal of all solid waste into the landfill; 0001AC, for final turbing of final cover areas

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left unturfed by a previous contractor; and 0001AD, for placement of prefinal and final covers and furnishing and placing turf on areas where the previous contractor placed daily cover only. The two option periods (CLINs 0002 and 0003) each listed two sub-items: 0002AA and 0003AA, for collection and transportation of waste to the landfill; and 0002AB and 0003AB, for operation of the landfill and disposal of waste. Schedule II (off-post disposal) also contained a base period (CLIN 0004) and two 1-year option periods (CLINs 0005 and 0006). Each CLIN required the collection of waste, transportation to an off-post facility, and disposal. Unlike Schedule I, Schedule II did not include sub-items for turfing and covering areas left unturfed by the previous contractor. Finally, the solicitation provided that bids would be evaluated "by adding the total price for all options to the total price for the basic requirement."

Five bids were received as of bid opening on December 17. Reliable submitted the lowest evaluated bid under Schedule I, \$2,485,780, including \$47,680 for sub-items 0001AC and 0001AD. MDI submitted the lowest evaluated bid under Schedule II, \$2,475,000, which was also the lowest overall bid. Reliable initially challenged the evaluation in an agency-level protest denied by the Army on January 27. MDI was awarded the contract on January 30, and Reliable filed this protest with our Office on February 3. A stop work order has been issued pending resolution of the protest.

Reliable protests that the evaluation was improper because different bidders' prices were based on different work. Specifically, Reliable believes its bid on Schedule I improperly was evaluated to include the \$227,500 it bid for the work under sub-items 0001AC and 0001AD, which work was unrelated to the refuse collection and disposal services called for, and would have to be performed whether or not the on-post landfill was used; Mark Dunning's Schedule II bid was not required to cover this work and therefore understandably was lower. Reliable's bid would be low if the additional sub-items were not included in its bid.

The Army maintains that Reliable's protest was untimely filed since the IFB clearly indicated the different manner in which the Schedule I and Schedule II bids would be evaluated, but Reliable did not protest the evaluation scheme prior to the bid opening, as required under our Bid Protest Regulations. 4 C.F.R. § 21.2(a) (1988). Reliable asserts that it did not protest prior to bid opening because it read the IFB as not providing for evaluation of sub-items 0001AC and 0001AD.

We need not consider the timeliness of Reliable's protest. Under our Regulations, we have the discretion to invoke the significant issue exception to our timeliness rules at 4 C.F.R. § 21.2(b) when, in our judgment, the circumstances of the case are such that our consideration of the protest would be in the interest of the procurement system. Hunter Environmental Services, Inc., B-232359, Sept. 15, 1988, 88-2 CPD ¶ 251. We have held that where the record clearly indicates that there has been a violation of law, invoking the significant issue exception may be warranted. Adrian Supply Co.--Reconsideration, 66 Comp. Gen. 366 (1987), 87-1 CPD ¶ 357; The Department of the Navy; Fairchild Weston Systems, Inc.--Request for Reconsideration, B-230013.2 et al., July 29, 1988, 88-2 CPD ¶ 100. We find that such is the case here.

It is a fundamental principle of procurement law that a solicitation must be drafted in such a manner that bids can be prepared and evaluated on a common basis; only if bids are evaluated on a common basis can fairness be assured, and only then can contracting officials determine which bid offers the lowest cost to the government. Amarillo Aircraft Sales & Services, Inc., 63 Comp. Gen. 568 (1984), 84-2 CPD ¶ 269, aff'd, Amarillo Aircraft Sales & Services, Inc.--Request for Reconsideration, B-214225.2, Nov. 28, 1984, 84-2 CPD ¶ 582.

Here, the record indicates that the work to be performed under sub-items 0001AC and 0001AD is corrective work left uncompleted by a previous contractor. The work is not related to landfill use by a new contractor for on-post disposal; a new on-post contractor is required by the IFB to turf its own new fill. Thus, as the Army itself points out, subitems 0001AC and 0001AD will have to be performed even if the contract is awarded for off-post disposal. Since the solicitation required only those firms offering on-post disposal to price the unrelated work, such firms were placed at an unjustified competitive disadvantage and bids could not be evaluated on a common basis. In this regard, we note that Reliable's Schedule I (on-post) price, exclusive of the unrelated work that must be completed whichever firm receives the contract, is \$36,900 less than MDI's Schedule II (off-post) price. Thus, had Reliable and MDI both been required to bid only on the collection and disposal requirement, Reliable would have been the low bidder.

We conclude that, due to the defective evaluation scheme that resulted in the unwarranted inflation of Reliable's bid price, the award of a contract to MDI for the refuse collection and disposal requirement did not result in the lowest cost to the government. Rather, Reliable's bid was

low for the sub-item 0001AA and 0001AB work awarded to MDI. Accordingly, by separate letter to the Secretary, we are recommending that the contracting officer terminate MDI's contract for the convenience of the government and award a contract for the collection and disposal requirement to Reliable based on the firm's bid for sub-items 0001AA and 0001AB, if otherwise appropriate. We also find Reliable entitled to recover its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1); see Sanford and Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266.

The protest is sustained.

A handwritten signature in cursive script, reading "Milton J. Foster".

Acting Comptroller General
of the United States